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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 942

BRYAN COUNTY, STATE OF OKLAHOMA, AND THE BOARD OF COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The District Court delivered no opinion. The opinion of the Circuit Court of Appeals (R. 66–72) is reported in 123 F. (2d) 782.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 12, 1941 (R. 72–73). The petition for a writ of certiorari was filed February 11, 1942. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the United States, having promised the enrolled members of the Choctaw Nation of Indians that their allotments of land should be nontaxable for 21 years, has a sufficient interest in the enforcement of its tax-exemption agreement to enable it to maintain suit in a federal court to recover state property taxes wrongfully exacted from unrestricted allottees, notwithstanding the fact that the allottees had previously assigned their tax claims to a third person whose suit in the state courts to recover such moneys was defeated by a plea of limitations.

CONSTITUTION AND STATUTES INVOLVED

The relevant provisions of the Act of June 28, 1898, 30 Stat. 495, 507, the Act of July 1, 1902, 32 Stat. 641, the Act of June 16, 1906, 34 Stat. 267, the Oklahoma Constitution, Art. X, sec. 6, and the Act of May 27, 1908, 35 Stat. 312, are set forth in the Appendix, *infra,* pp. 9–12.

STATEMENT

In 1905 and 1908 Minnie Brewer and Lake Brewer, enrolled members of the Choctaw Nation, received homestead and surplus allotment patents (R. 13–22) to certain lands which the United States, in the Atoka Agreement of 1897 (ratified by the Curtis Act of 1898), promised should be nontaxable for 21 years after the patents issued, while title remained in the original allottees.

Section 29 of the Act of June 28, 1898, 30 Stat. 495, 507. In spite of the provisions contained in the Oklahoma Enabling Act and Constitution preserving this tax immunity (Act of June 16, 1906, 34 Stat. 267; Okla. Const., Art. X, sec. 6), the taxing officials of Oklahoma placed all unrestricted allotments on the tax rolls, and subsequently collected taxes from hundreds of Indian allottees, including $223.47 from the Brewers (R. 7–8, 26–29, 35–37), in the belief that the Act of May 27, 1908, 35 Stat. 312, removing restrictions on alienation and purporting to end the tax exemption, was effective to subject the lands to taxation.

In *Choate* v. *Trapp,* 224 U. S. 665,[1] this Court held on a bill for injunction that exemptions from taxation and restrictions on alienation were "two separate and distinct subjects", that the Indian allottees, by reason of the tax-exemption feature of the Atoka Agreement, had acquired a vested right protected by the Fifth Amendment, good against both the United States and the State of Oklahoma, and that the exemption survived the 1908 statute. Notwithstanding this adjudication, the taxing authorities of Oklahoma refused to refund the taxes which they had theretofore collected from the Indian allottees.

There followed a series of attempts to recover such taxes by court action: some suits were brought

[1] For subsequent decisions to the same effect, see *Ward* v. *Love County,* 253 U. S. 17; *Carpenter* v. *Shaw,* 280 U. S. 363.

by the allottees themselves, other suits by one George R. Broadwell, to whom a great number of Indians (including the Brewers) had assigned their tax claims, and finally several suits (including the present litigation) by the United States. The first attempts by the allottees and by Broadwell failed in the courts of Oklahoma on the ground that the taxes had been voluntarily paid. *Board of Com'rs, Love County* v. *Ward,* 68 Okla. 287; *Broadwell* v. *Board of Com'rs, Carter County,* 71 Okla. 162; *Board of Com'rs of Grady County* v. *Broadwell,* 75 Okla. 9. This Court reversed, holding that a federal right was involved, that the taxes were in reality paid under compulsion, and that "money got through imposition" may be recovered back. *Ward* v. *Love County,* 253 U. S. 17; *Broadwell* v. *Carter County,* 253 U. S. 25. The question whether such claims were not in fact barred by the state statute of limitations was, however, left open. And when subsequent suits were brought (including a suit by Broadwell to recover on behalf of the Brewers), they were defeated by the plea of limitations. *Broadwell* v. *Board of Com'rs of Bryan County,* 88 Okla. 147, certiorari denied, 262 U. S. 750.

It thus became necessary for the United States itself to take steps to recover the taxes in those instances where they had not yet been refunded, if the tax-exemption guaranty contained in the Atoka Agreement was to be thoroughly enforced. De-

mand for refund was accordingly made on the taxing authorities of counties which had collected the taxes in violation of the Atoka Agreement and had not refunded the amounts paid by the Indians on their land. Tulsa County having refused repayment in one case, the United States instituted court proceedings. Recovery was allowed in *United States* v. *Board of County Commissioners,* 19 F. Supp. 635 (N. D. Okla.), affirmed, 94 F. (2d) 450 (C. C. A. 10). In 1939 the Government brought a similar suit against Bryan County to recover the $223.47 exacted by the County from the Brewers during 1908, 1909, 1910, and 1911 (R. 5–9). Again the United States had judgment (R. 58–59) and the Circuit Court of Appeals for the Tenth Circuit affirmed (R. 72–73). The county officials now request certiorari.

ARGUMENT

Petitioners contend,[2] in effect (Pet. 6, 14, 17–20), that the United States cannot maintain a suit in its own behalf and on behalf of Indian allottees to enforce tax exemptions guaranteed by it to enrolled members of the Choctaw Nation by the Atoka Agreement of 1897, which was ratified by section 29 of the Curtis Act of June 28, 1898, 30 Stat. 495, 507.

[2] They concede that the lands in question were exempt from taxation during the years 1908–1911, and, accordingly, that the collection of $223.47 from the Brewers was illegal (Pet. 3).

The contention that the United States has no standing in its own right contradicts repeated decisions of this Court. The Government has the right and the duty, as the court below observed (R. 70–71), to see that its consensual obligations are properly discharged and its declared policies fully respected; to this end it may invoke the aid of its courts "in removing unlawful obstacles to the fulfillment of its obligations." *United States* v. *Minnesota,* 270 U. S. 181, 194; *United States* v. *Rickert,* 188 U. S. 432, 434. The interest of the United States in seeing that its obligations and policies are observed "is one which is vested in it as a sovereign." *United States* v. *Minnesota,* 270 U. S. 181, 194. That interest cannot be prejudiced by an assignment to which the United States has not consented nor impaired by a judgment in a proceeding to which it was not a party. *United States* v. *Candelaria,* 271 U. S. 432, 444; *Sunderland* v. *United States,* 266 U. S. 226, 232; *Privett* v. *United States,* 256 U. S. 201, 204; *Bowling* v. *United States,* 233 U. S. 528, 534. Accordingly, the Brewers' assignment and the decision in *Broadwell* v. *Board of Com'rs of Bryan County,* 88 Okla. 147, certiorari denied, 262 U. S. 750, raise no bar to a suit by the United States to recover property taxes collected by the county in violation of the Atoka Agreement.

Petitioners also deny that the Government may bring such suits on behalf of Indians whose allot-

ments are no longer restricted against alienation (Pet. 21–26). As this Court has stated, exemptions from taxation and restrictions on alienation are "two separate and distinct subjects." *Choate* v. *Trapp,* 224 U. S. 665, 673; *Williams* v. *Johnson,* 239 U. S. 414, 420. Vested tax exemptions therefore continue even after restrictions on alienation are removed. *Choate* v. *Trapp,* 224 U. S. 665. And the duty of the United States to see its guaranty of tax immunity respected is a continuing obligation although the allottees have become citizens, restrictions on alienation have been removed, and the Indians have been otherwise discharged from the relation of wardship. *Cramer* v. *United States,* 261 U. S. 219, 232; *United States* v. *Heckman,* 224 U. S. 413, 437; *Board of Com'rs of Tulsa County, Okla.* v. *United States,* 94 F. (2d) 450, 452 (C. C. A. 10); *United States* v. *Sherburne Mercantile Co.,* 68 F. (2d) 155, 158 (C. C. A. 9).

Finally, it is not material to petitioners what disposition the United States makes of the tax moneys which it recovers. Petitioners' suggestion (Pet. 7, 20) that the judgment herein will only enure to the benefit of George R. Broadwell, the assignee, is in any event devoid of merit. The United States is not bound to recognize the assignment. *Privett* v. *United States,* 256 U. S. 201; *Bowling* v. *United States,* 233 U. S. 528.

CONCLUSION

The decision of the Circuit Court of Appeals is in accord with the applicable decisions of this Court, raising no new question of substance, and presents no conflict. It is therefore respectfully submitted that the petition should be denied.

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MARCH 1942.

APPENDIX

The agreement between the United States and the Choctaw and Chickasaw Tribes, ratified by section 29 of the Act of June 28, 1898, 30 Stat. 495 507, provides, in part:

> All the lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from date of patent, and each allottee shall select from his allotment a homestead of one hundred and sixty acres, for which he shall have a separate patent, and which shall be inalienable for twenty-one years from date of patent. * * * Selections for homesteads for minors to be made as provided herein in case of allotment, and the remainder of the lands allotted to said members shall be alienable for a price to be actually paid, and to include no former indebtedness or obligation—one-fourth of said remainder in one year, one-fourth in three years, and the balance of said alienable lands in five years from the date of the patent.

Sections 12, 13, 15, and 16 of an agreement between the United States and the Choctaw and Chickasaw Tribes, ratified by the Act of July 1, 1902, 32 Stat. 641, 642, provide:

> 12. Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and

sixty acres of the average allottable land of the Choctaw and Chickasaw nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead.

13. The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment.

* * * * *

15. Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this Act, nor shall said lands be sold except as herein provided.

16. All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent: *Provided,* That such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value.

Section 1 of the Oklahoma Enabling Act of June 16, 1906, 34 Stat. 267, provides:

> That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may

> adopt a constitution and become the State of Oklahoma, as hereinafter provided: *Provided,* That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed.

Article X, section 6, of the Constitution of Oklahoma provides, in part:

> * * * such property [shall be exempt from taxation] as may be exempt by reason of treaty stipulations, existing between the Indians and the United States government, or by Federal laws, during the force and effect of such treaties or Federal laws.

Section 1 of the Act of May 27, 1908, 35 Stat. 312, provides, in part:

> That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood

> shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. * * *

Section 4 of the same Act provides, in part:

> That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: * * *

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BRYAN COUNTY, STATE OF OKLAHOMA, and the BOARD OF COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,

PETITIONERS,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI REQUIRING THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES, FOR ITS REVIEW AND DETERMINATION, THE CASE OF BRYAN COUNTY, STATE OF OKLAHOMA, AND THE BOARD OF COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA, APPELLANTS VS. THE UNITED STATES OF AMERICA, APPELLEE, AND BRIEF IN SUPPORT THEREOF.

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February, 1942.

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IN THE

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No.

BRYAN COUNTY, STATE OF OKLAHOMA, and the BOARD OF COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,

PETITIONERS,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI REQUIRING THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES, FOR ITS REVIEW AND DETERMINATION, THE CASE OF BRYAN COUNTY, STATE OF OKLAHOMA, AND THE BOARD OF COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA, APPELLANTS VS. THE UNITED STATES OF AMERICA, APPELLEE, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

Your Petitioners respectfully show:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is an action brought by the United States of America for and on behalf of one Minnie Brewer, one-fourth degree Choctaw, and Lake Brewer, Choctaw citizen by marriage, alleged Indian Wards of the Federal Government, against Bryan County, Oklahoma, a Body Politic and Quasi-Public Corporation, and Board of County Commissioners of Bryan County, Oklahoma, for the recovery of taxes in the amount of $223.47, with interest allegedly wrongfully exacted from Minnie Brewer and Lake Brewer, during the years 1908, 1909, 1910 and 1911, on certain allotted lands owned by them, in Bryan County, Oklahoma, which were exempt from taxation during said years by certain Acts of Congress. The material facts were stipulated and are substantially as follows (R. 34-54):

Minnie Brewer, quarter-blood Choctaw Indian, and Lake Brewer, an intermarried white citizen of the Choctaw Nation, each received homestead and surplus allotments in Bryan County, from the United States under the Acts of June 28, 1899, c. 517, 30 Stat. 495, and July 1, 1902, c. 1362, 32 Stat. 641, which were non-taxable and inalienable thereunder. These lands became alienable when restrictions against alienation were removed from allotted lands of allottees, enrolled as intermarried whites and as

mixed blood Indians having less than one-half Indian blood, by Section 1 of the Act of May 27, 1908, c. 199, 35 Stat. 312.

The county officials of Bryan County, believing that the allotted lands aforesaid, together with other lands in the same class, were subject to taxation since the restrictions thereon were removed by the Act of May 27, 1908, and as appeared to be authorized by Section 4 thereof, placed said lands upon the tax rolls of the county, and, during 1908-1911 inclusive, collected $223.47 from the Brewers. This belief was supported by decisions of the Supreme Court of the State of Oklahoma until the Supreme Court of the United States, in 1912, in *Choate* v. *Trapp*, 224 U. S. 665, 56 Law Ed. 941, involving taxes on similar allotments, held that such allotments remain tax-exempt despite the removal of restrictions against alienation of the 1908 Act.

It is admitted that said lands were exempt from taxation during said period aforesaid, and said taxes paid by the Brewers were from unrestricted funds, and have admittedly long since been appropriated and expended for the proper administration of county government.

That subsequent to the payment of the taxes involved herein and prior to March 27, 1914, the Brewers, admittedly unrestricted Indians, for a valuable consideration, bargained, sold and assigned all their right, title and interest, in and to their claims for refund of said items of taxes involved herein, to George R. Broadwell of Oklahoma City,

Oklahoma. It is admitted that, at the time of the execution of the assignment and delivery thereof to Broadwell, the Brewers were citizens of the State of Oklahoma and *were possessed of all the powers and privileges necessary to make said assignment. The lands upon which said taxes were paid were unrestricted allotted lands.*

On or about March 27, 1914, the said George R. Broadwell presented a petition to the Board of County Commissioners of Bryan County, Oklahoma, predicated upon said assignments from the said Minnie Brewer and Lake Brewer, as well as upon similar assignments from several other members of the Choctaw-Chickasaw tribes of Indians, demanding the return, among others, of the very items of taxes upon which the United States Government in this proceeding seeks to recover from Bryan County and the Board of County Commissioners of Bryan County. That there were approximately 1462 separate causes of action set forth in said petition, and it is admitted that the items of taxes involved herein were the same identical taxes involved in said petition filed by the said Broadwell.

Thereafter, on April 7, 1914, the Board of County Commissioners of Bryan County disallowed said petition and Broadwell appealed to the District Court of Bryan County. The District Court of Bryan County sustained a demurrer to Broadwell's petition, on July 23, 1918, and he appealed to the Supreme Court of the State of Oklahoma. On May 2, 1922, the Supreme Court of Okla-

homa interposed the bar of the Statute of Limitations to Broadwell's petition, and denied the petition for rehearing therein, on January 23, 1923. *Broadwell* v. *Board of Com'rs. of Bryan County*, 88 Okla. 147, 211 Pac. 1040.

Thereafter, Broadwell made application to the Supreme Court of the United States for *writ of certiorari* in said matter, and said Court, in the case of *George R. Broadwell* v. *County Com'rs. of Bryan County*, 262 U. S. 740, 66 Law Ed. 1214, denied said writ, on May 7, 1923, thus making the decision of the Supreme Court of Oklahoma final. It is admitted that the United States of America was not a party in said case.

In 1939, following refusal of a demand by a United States Probate Attorney for the Five Civilized Tribes, upon the Board of County Commissioners of Bryan County, for return of the taxes paid by the Brewers, the United States filed the present action on its own behalf, and on behalf of the Brewers as its Indian Wards, seeking recovery of the taxes, a declaration of the invalidity of the tax proceedings, and cancellation of the assessments, and the order of the Board of County Commissioners placing the allotments on the tax rolls during 1908-1911 inclusive. The defendants interposed jurisdictional objections to the complaint, first by a motion to dismiss (R. 22-25), and then by answer (R. 26-34). The case was submitted to the court upon stipulation of facts (R. 34-54). The District Court of the United States, Eastern District of Oklahoma, entered judgment on January 6, 1941, in favor of the plaintiff, in the

amount of $223.47, with costs, but denied the interest. Appeal was perfected to the Circuit Court of Appeals of the Tenth Circuit, in which the judgment of the District Court was affirmed on November 12, 1941 (123 Fed. [2d] 782).

STATEMENT OF POINTS RELIED ON BY PETITIONERS

Following are the points relied on by the petitioners in this appeal:

a. That the United States was without authority to maintain, and the District Court of the United States and Circuit Court of Appeals were without jurisdiction to hear and determine, this action to recover advalorem taxes wrongfully assessed and collected by State sovereignty upon unrestricted allotted lands belonging to unrestricted Indians, who had, prior thereto, for a valuable consideration, bargained, sold, conveyed and assigned all their right, title and interest in and to their claim for refund of said taxes.

b. That the above courts were without jurisdiction over the subject matter and of the parties to this action for the reason that Minnie Brewer one-fourth degree Choctaw, and Lake Brewer, intermarried white citizen, admittedly unrestricted Indians, are the real parties in interest rather than the United States, and are no longer wards of the Federal Government, and hence there is no diversity of citizenship.

c. That the above courts were without jurisdiction for the reason that the adverse adjudication by a State court

of competent jurisdiction over the same subject matter, to which the same unrestricted Indians herein were privy, as assignors for value of the claims for refund, constitutes *res adjudicata* as to the United States, even though the United States was not a party to the proceedings.

II.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. That the opinion of the Circuit Court of Appeals holds in effect that the United States Government can maintain an action to recover on a claim for the refund of taxes paid by an unrestricted Choctaw Indian of one-fourth degree Indian blood and Choctaw citizen by marriage (no Indian blood) on unrestricted allotted lands in violation of their treaty rights, which claim for refund had been legally and validly sold, transferred and assigned by them prior to the institution of the Government's action, to one George R. Broadwell, a white citizen of Oklahoma, who by reason of his assignment would be entitled to the proceeds of any judgment rendered. That said opinion in so holding is contrary to the opinion of the Supreme Court of Oklahoma in the case of *Broadwell* v. *Board of County Com'rs. of Bryan County*, 88 Okla. 147, 211 Pac. 1040, *certiorari* denied, 282 U. S. 749, 66 Law Ed. 1214, wherein the Supreme Court of Oklahoma held that Broadwell, as the assignee and owner of said claims for refund, was not entitled to recover.

2. The right of the United States Government to maintain an action to recover taxes levied and paid by unrestricted Choctaw Indians on tax exempt allotted lands in violation of their treaty rights, after the claim of said Indians for refund of said taxes had been validly assigned, sold and transferred, and after the right of said assignee to recover such taxes from the county to which same were paid had been adversely decided by a final judgment of the Supreme Court of Oklahoma, is an important federal question which has never been settled by this Court. That said question is of extreme public importance to the several counties of the State of Oklahoma and will affect the maintenance of numerous actions involving many thousands of dollars in each of the counties of Oklahoma located within the former Indian Territory where similar assignments of claims for refund have been made by unrestricted Indian allottees to third persons.

Should the Government prevail in this action, it would result in a great financial burden to many of the counties in the Indian Territory part of Oklahoma, and would probably necessitate the levying of ad valorem taxes by the various counties on lands belonging to citizens other than of Indian blood to pay this judgment as well as others that would follow.

3. That the decision of the Circuit Court of Appeals is in conflict with and not in accord with applicable decisions of the Supreme Court of the United States. See

United States v. *Waller*, 243 U. S. 452; *United States* v. *Beebe*, 127 U. S. 338, 32 Law Ed. 121.

4. That the decision of the Circuit Court of Appeals is in conflict with decisions of that court which recognize the rule that a final judgment in a court of competent jurisdiction on the merits between the same parties, or between those in privy with them upon the same claim or demand, is conclusive whether erroneous or not, not only as to every matter offered in the former action, but as to every admissible matter which could have been offered to sustain the claim. See *Swift* v. *Jackson* (C. C. A. 10), 37 Fed. (2d) 237, 240, 241; *Vinson* v. *Graham*, 44 Fed. (2d) 772 (C. C. A. 10); *United States* v. *Lee*, 108 Fed. (2d) 936, wherein the Tenth Circuit Court of Appeals on December 21, 1939, held:

> "A State court of competent jurisdiction in Oklahoma may render a valid judgment in respect to unrestricted property of an Indian of the Five Civilized Tribes, and such a judgment constitutes res adjudicata as to the Indian, and it is not open to attack in a later suit brought by the United States, except on jurisdictional grounds, even though the United States was not a party to the suit."

5. That the decision in the case of *Choate* v. *Trapp*, 224 U. S. 679, 56 Law Ed. 941; *Atlantic & Pacific Railroad Co.* v. *Mimgus*, 165 U. S. 413; *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Heckman* v. *United States*, 224 U. S. 413; *Mullen* v. *United States*, 224 U. S. 448; *United States* v. *Minnesota*, 270 U. S. 181, and *United States* v. *Creek Na-*

tion, 295 U. S. 103, upon which the Tenth Circuit Court of Appeals relied in rendering its decision herein complained of are not applicable to the case at bar.

Furthermore, the decision in the case of *Board of County Commissioners of Tulsa County, Oklahoma* v. *United States*, 94 Fed. (2d) 450, and *Board of County Commissioners of County of Jackson, Kansas* v. *United States*, 308 U. S. 343; *Privett* v. *United States*, 256 U. S. 201; *United States* v. *Candelaria*, 271 U. S. 432, upon which the Circuit Court of Appeals relied in rendering this decision are not applicable to the case at bar.

6. That the opinion of the Circuit Court of Appeals in holding that the admittedly unrestricted Indians involved herein are still wards of the Federal Government misconstrued the Act of Congress of May 27, 1908 (35 Stat. 321), and other Congressional Acts. That said Circuit Court is so holding that said unrestricted Indians are still wards of the Federal Government is in conflict with *Blundell* v. *Wallace*, 96 Okla. 26, and *Blundell* v. *Wallace*, 267 U. S. 372, 69 Law Ed. 664; *Cully* v. *Mitchell*, 37 Fed. (2d) 493 (C. C. A. 10); *Choteau* v. *Burnet*, 283 U. S. 691, 75 Law Ed. 1353.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue to the Circuit Court of Appeals for the Tenth Circuit, charging said court to certify and send to this Court a full and complete transcript of the record and all proceedings of said Circuit Court had in

the case numbered and entitled on its docket, No. 2308, *Bryan County, State of Oklahoma, and the Board of County Commissioners of Bryan County, Oklahoma, Appellants* v. *United States of America, Appellee*, to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of said United States Circuit Court of Appeals be reversed by the Court and for such relief as to this Court may seem proper.

Copies of the transcript of record in this case in the Circuit Court of Appeals for the Tenth Circuit are filed herewith in conformity with rule No. 38 of this Honorable Court.

MAC Q. WILLIAMSON,
Attorney General of the
State of Oklahoma,

HOUSTON BUS HILL,
Assistant Attorney General,

BILL STEGER,
County Attorney,
Bryan County, Oklahoma,

Counsel for Petitioners.

February 7, 1941.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

THE OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit sought to be reviewed was handed down on November 12, 1941.

It is reported in 123 Fed. (2d) 782, Advance Sheet No. 6. No petition for rehearing was filed.

II.

JURISDICTION

1. The ground on which the jurisdiction of this Court is invoked is Judicial Code 240, as amended by Act of February 13, 1925, c. 229, Sec. 1 (43 Stat. 938) (28 U. S. C. A. 347), providing for the issuance of writs of certiorari by the Supreme Court of the United States to review judgments of the Circuit Court of Appeals.

2. The facts in this case as stipulated show that the nature of the case and of the rulings below were such as to bring the case within the scope of the provision relied on.

3. This case is of great public importance to the citizens of Oklahoma in that it effects the refund of many thousands of dollars in taxes paid on tax exempt allotted Indian lands located in the former Indian Territory of Oklahoma, which claims for refund have been assigned to third persons for value by said allottees.

III.

STATEMENT OF THE CASE

The nature of the case and the ruling of the Circuit Court of Appeals for the Tenth Circuit has already been stated in the foregoing petition which is adopted as a part of this brief.

IV.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals below erred:

(a) In holding that the United States could maintain an action in United States District Court and the Circuit Court of Appeals in its own behalf and upon behalf of two unrestricted Choctaw Indian allottees to recover ad valorem taxes wrongfully assessed and collected by a State sovereignty upon unrestricted allotted lands of said allottees when said allottees had prior thereto, for a valuable consideration, sold, conveyed and assigned all their right, title and interest in and to their claim to said refund of said taxes.

(b) In holding that Minnie Brewer, one-fourth degree Choctaw, and Lake Brewer, Choctaw citizen by marriage, admittedly unrestricted Indians are still wards of the Federal Government.

(c) In holding that an adverse adjudication by a State court of competent jurisdiction over the same subject matter, to which the same unrestricted Indians were

privy, as assignors of the claim for refund, does not constitute *res adjudicata* as to the United States, when it was not a party to the proceedings.

V.

ARGUMENT

Summary of the Argument

(a) The stipulated fact that the Brewers, unrestricted Indians and citizens of the United States, with full and complete power to contract, for a valuable consideration, bargained, sold and assigned all their right, title and interest in and to their claims to the items of taxes involved herein to one Broadwell, *is conclusive that said Indians could have no interest whatsoever in any moneys recovered by the United States in this action*, and therefore, said Indians having no interest, the United States certainly has no authority to institute and maintain, in our Federal Courts, this action, for itself or for and on behalf of Minnie and Lake Brewer.

While the United States may have owed a duty to such unrestricted Indians under treaty agreements between the Indians and the United States Government to see that their allotted lands were not taxed for twenty-one years from date of patent, these unrestricted Indians had all the power and authority necessary to contract with reference to their lands or any other personal property right which they possessed, and having sold and assigned all their interest in their claims for refund of the taxes involved herein for a valuable consideration, said unrestricted Indians were thereby made whole and there was nothing left for the United

States Government to do to protect such Indians as they had not been hurt. To permit the United States to prevail in this action, would be in effect holding that such Indian allottees were restricted Indians which would be contrary to the provisions of the Act of May 27, 1908, and the decisions of this Court.

(b) The Court will observe from the record that Minnie Brewer, one-fourth degree Choctaw Indian, and Lake Brewer, a Choctaw citizen by marriage (but of no Indian blood), in whose behalf the United States is attempting to maintain this action, are, and have been at all times herein, unrestricted Indians, and what restrictions, if any, on the alienation of their allotted lands were completely removed by the Act of May 27, 1908, 35 Stat. at Large, Chapter 199, p. 312. These facts are stipulated herein (R. 34-54). Furthermore, the moneys used by the Brewers to pay said taxes were unrestricted, and the United States never at any time had supervision or control over said money or any part thereof.

It is the policy of Congress at all times touching Indian affairs to place the Indian, as far as practicable and beneficial to the Indian, on the same footing as other citizens of the community or state in which the Indian resides, and the course of its legislation discloses the plan of the Government to gradually emancipate the Indian from his former status as a ward, to prepare him for complete independence by education and the gradual release of his property to his own individual management, imposing upon him both the responsibilities and privileges of the owner

of property, including the duty to pay taxes, leaving the regulatory State and Federal laws to operate on him as in the case of other persons and property. This Court should so construe the Act of May 27, 1908. The Brewers not being wards of the Federal Government, but being citizens of the State of Oklahoma and amenable to the laws thereof and being the real parties in interest, in whose behalf the Government attempts to maintain this action, there is no diversity of citizenship and therefore the District Court of the United States and the Circuit Court of Appeals have no jurisdiction of this case.

(c) Where a state court of competent jurisdiction in Oklahoma has rendered a final judgment on a valid assignment for value of an unrestricted property right of an unrestricted Indian of the Five Civilized Tribes, such a judgment constitutes *res adjudicata* as to the assignee and the Indian in privy with him, and is conclusive as to the United States in a latter suit covering the same subject matter, even though the United States was not a party to the first suit.

Argument in Chief

(Proposition a.)

It is elementary that the Brewers, being unrestricted Indians and the owners of unrestricted allotted lands, possessed the right to contract with respect to such property or any other personal property right which they possessed, and having exercised that right by executing an assignment, for value, of their claims for refund of the identical items of taxes involved herein, to Broadwell, they would have no interest whatsoever in any moneys recovered by the United States in this action, and therefore the United States has no right to invoke the jurisdiction of the United States District Court, or of the Circuit Court of Appeals, in its own behalf or on the behalf of the Brewers in this action. The Circuit Court of Appeals of the Tenth Circuit and this Honorable Court have held that a *restricted* Indian possesses the right to contract with respect to his unrestricted property, or to convey it. See *United States* v. *Lee*, 108 Fed. (2d) 936 (C. C. A. 10); *State* v. *Waller*, 243 U. S. 452; *United States* v. *Beebe*, 127 U. S. 338, 32 Law Ed. 121. This being true, it follows that *unrestricted* Indians of the Five Civilized Tribes possess the right to contract with respect to their unrestricted property, or other property rights, such as the Brewers exercised in this case. The Supreme Court of the State of Oklahoma and the Supreme Court of the United States recognized this right in the following cases: *Broadwell* v. *Board of County*

Commissioners of Bryan County, 88 Okla. 147, 211 Pac. 1040, certiorari denied, 262 U. S. 749, 67 Law Ed. 1214; *Broadwell* v. *Board of County Commissioners of Carter County*, 71 Okla. 287, 175 Pac. 828; *Board of County Com'rs* v. *Broadwell, et al.*, 75 Okla. 9, 180 Pac. 955; *Ward* v. *Board of County Commissioners of Love County*, 253 U. S. 15, 64 Law Ed. 751; *Broadwell* v. *Board of County Commissioners of Carter County*, 253 U. S. 23, 64 Law Ed. 759.

The Tenth Circuit Court of Appeals and this Honorable Court have announced the rule that the United States Government has a right to enforce through the courts of the United States suits on behalf of Indian wards to enforce treaty agreements with the members of the Five Civilized Tribes which vested in the Indians a property right with respect to tax exemption on their allotted land for twenty-one years from date of patent. See *Board of County Commissioners of Tulsa County* v. *United States*, 94 Fed. (2d) 450; *United States* v. *Rickert*, 188 U. S. 432; *Stephens* v. *Cherokee Nation*, 174 U. S. 455; *Bowling and Miami Investment Company* v. *United States*, 233 U. S. 528; *Board of County Commissioners of the County of Jackson, Kansas* v. *United States*, 308 U. S. 343; *Heckman* v. *United States*, 224 U. S. 413; *United States* v. *Minnesota*, 270 U. S. 181.

In all of the above cases, with the exception of the case of *Board of County Commissioners of Tulsa County*

v. *United States, supra*, the property rights involved were those of restricted Indians of Oklahoma, or involved restricted Indian Tribes in other states. In *Board of County Commissioners of Tulsa County* v. *United States, supra*, the United States brought suit on behalf of a Cherokee Indian of one-eighth degree Indian blood to recover ad-valorem taxes and special improvement assessments which had been levied on said Indian's homestead, and which were paid under protest by the Indian to prevent the sale of said allotment by Tulsa County for said taxes.

The real question involved and relied upon by the Board of County Commissioners of Tulsa County was the application of the Act of April 12, 1926 (44 Stat. 239), which made the statute of limitations of the State of Oklahoma applicable to "all restricted Indians" of the Five Civilized Tribes. The Court held said Act of Congress applied only to suits involving title to allotted lands of "restricted Indians' and not to personal actions in assumpsit to recover back taxes illegally assessed on allotted lands. The only other question presented in said case was the right to recover interest on the taxes paid.

The above case can be distinguished from the case at bar in this, that here the Brewers, unrestricted Indian allottees, possessing all of the powers and privileges of contracting, as that of any other citizen of the State of Oklahoma, had for a valuable consideration, bargained, sold and assigned all their right, title and interest in and to their vested right to their claims for refund of the items of taxes

paid on their unrestricted allotted lands, while in the Tulsa County case the unrestricted Indian allottee had not sold and assigned her claim for the refund of the taxes which the United States sought to recover on her behalf. It is our contention that the Tenth Circuit Court of Appeals in the Tulsa County case did not have called to its attention the citations and authorities and Acts of Congress which we are presenting herein and which disclose that there are no restrictions on allottees, as intermarried whites and mixed blood Indians of less than half blood, including minors, and that such unrestricted Indians, in which class the Brewers fall, are amenable to the laws of the State of Oklahoma the same as any other citizen and possess the right to contract and to maintain actions in their own name affecting their property or property rights.

We therefore submit that if the United States is permitted to prevail in this action, the moneys recovered would legally belong to Broadwell, since he holds valid assignments for the claims for refund of said taxes. Certainly the Government would not contend that it had authority to institute and maintain this action in the Federal courts for the benefit of Broadwell, a white citizen of Oklahoma. For this Court to hold that the Brewers were entitled to the moneys recovered herein, rather than Broadwell, would result in the Brewers being paid twice for the taxes exacted of them by Bryan County.

(Proposition b.)

To what extent and in what manner is the Federal Government the guardian of Indians? How far does that guardianship extend and what does it embrace?

Well, let us first consider the fact that all Indians in Oklahoma are now and have been ever since statehood not only citizens of the United States but citizens of the State. Let us further consider that the Federal Government is under no greater duty to these Indians than to any other class or race of people except in relation to the allotted lands, inherited allotted lands, and restricted moneys and tribal properties— and except insofar as it controls the Indians' use and control of such properties. Beyond exercising control over such properties such as could be exercised by a guardian, the Federal Government has never sought otherwise to act or assume the role of guardian in respect to these Indians.

Therefore, so far as the moneys earned and properties acquired by an unrestricted competent Indian citizen, separate and apart, and independent of any tribal allotments or properties, or income therefrom, the Federal Government has never assumed to exercise the rights of guardianship over these Indians. So, therefore, as to the moneys that were paid by the unrestricted Indian woman and her non-Indian husband involved in this case, the Government has never had any exercise or control over that money, nor over this Indian woman and her non-Indian husband in

relation thereto, and the fact is that the Federal Government in this case is carrying the theory and the assumed principle of guardianship clear beyond all bounds of reason.

The Court's particular attention is directed to the fact that never at any time under the Act of June 28, 1898, as modified by the Act of July 1, 1902, were there any restrictions placed upon that class of Indians to which Minnie Brewer and Lake Brewer belong, and when the restrictions on the alienability of their lands were removed by the Act of May 27, 1908, all relation of guardianship and ward by the Government over such Indians, assuming such relationship existed, thereby became extinguished.

As further evidence of the fact that Congress recognized that all restrictions had been removed on allottees of the Five Civilized Tribes, enrolled as intermarried whites, as freedmen, and as mixed blood Indians of less than half Indian blood, including minors, it is observed that Congress, on April 12, 1926, passed an Act (44 Stat. at Large 239) which is entitled, "An Act to amend Sec. 9 of the Act of May 27, 1908 (35 Stat. at Large, 312), for putting in force, in reference to suits involving Indian titles, the statutes of limitations of the State of Oklahoma, and providing for the United States to join in certain actions, and for making judgments binding on all parties, and for other purposes."

This Act makes the statute of limitations of Oklahoma specifically applicable to "restricted Indians" of the

Five Civilized Tribes and their heirs, but not to Indians of less than half blood, including minors and intermarried whites, the same being the class to which the Brewers belong, under the Act of May 27, 1908, *supra*. The language used in this Act evidences to our mind that Congress believed that its guardianship over unrestricted Indians, enrolled as intermarried whites, freedmen, and as mixed bloods having less than half Indian blood, including minors, had ceased, and that the statute of limitations and other laws of Oklahoma were applicable to such Indians.

In the case of *Blundell* v. *Wallace*, 96 Okla. 26, the Supreme Court in the body of the opinion said:

> "The effect of the Enabling Act and the schedule to the Oklahoma Constitution, as touching wills and testaments, was merely to substitute the Oklahoma territorial statutes for the laws then in force in the Indian Territory. *The policy of Congress at all times touching Indian affairs was to place the Indian as far as practicable and beneficial to the Indian, on the same footing as other citizens of the community or state in which the Indian resides, and this construction will be given to the acts of Congress unless the contrary intention appears.*'"

The above case was appealed to the Supreme Court of the United States, and is reported as *Blundell* v. *Wallace*, 267 U. S. 372, 69 Law Ed. 664. In the opinion of the Court delivered by Mr. Justice Sutherland, it is said:

> "By Sections 12 and 16 of the Supplemental Agreement with the Choctaws and Chickasaws, ratified by the Act of July 1, 1902, supra, lands of the kind here involved were declared to be inalienable during specified periods of time. It is settled that this restriction against alienation extended to a disposition by will

(Taylor v. Parker, 235 U. S. 42, 59 L. Ed. 121, 35 Sup. Ct. Rep. 22); and, but for Sec. 23, it is plain that the devise in question, at least, as to the homestead, would have been without effect.

"But, it must be borne in mind, the restriction was in respect to the specified lands, and did not affect the testamentary power of the Indians to dispose of their alienable property, which power, on the contrary, has been fully recognized, first by an extension of the appropriate laws of Arkansas over the Indian Territory, and then, upon the admission of the State of Oklahoma Law. Taylor v. Parker, supra; Jefferson v. Fink, 247 U. S. 288, 294, 62 L. ed. 1117, 1123, 38 Sup. Ct. Rep. 516. *The general policy of Congress prior to the adoption of Sec. 23 plainly had been to consider the local laws of descents and wills applicable to the persons and estates of Indians, except insofar as it was otherwise provided.* Thus, by Sec. 2 of the Act of April 28, 1904, ch. 1824, 33 St. at L. 573, the laws of Arkansas, theretofore put in force in the Indian Territory, were expressly 'continued and extended in their operation, so as to embrace all persons and estates in said territory, whether Indian, freedman, or otherwise,' and jurisdiction was conferred upon the courts of the territory in the settlement of the estates of decedents, etc., whether Indian, freedman, or otherwise.

"Sec. 23 must be read in the light of this policy; and, so reading it, we agree with the ruling of the State Supreme Court that Congress intended thereby to enable *'the Indian to dispose of his estate on the same footing as any other citizen, with the limitation contained in the proviso thereto.' The effect of Sec. 23 was to remove a restriction theretofore existing upon the testamentary power of the Indians, leaving the regulatory local law free to operate as in the case of other persons and property."*

In the case of *Cully* v. *Mitchell*, 37 Fed. (2d) 493, which went up to the Tenth Circuit Court of Appeals from

the Eastern District of Oklahoma, the Circuit Court in an opinion written by Judge McDermott, in discussing the provisions of the Act of May 27, 1908, said:

> *"Our opinion, on the contrary, is that Congress removed the restrictions from 'all lands of said allottees enrolled as mixed-blood Indians having less than half Indian blood.' That is what the statute says.* By that language, Congress clearly pointed to certain rolls then in existence, and said ,in substance, 'Restrictions are removed from those persons who are listed there as less than half-bloods.' Then, in order that no uncertainty might exist, and that there might be some certain and exclusive method of ascertaining a nebulous fact, and that some stability might exist as to land titles, Congress enacted Sec. 3, by which it said, in clear language, that only the rolls of citizenship might be looked to for quantum of Indian blood; but as to age, one might look to all of the enrollment records of the Commissioner.
>
> "If the language of the statute is clear, as we think it is, resort to the legislative history, or to administrative construction, is not necessary. In this case, such aids to construction fortify the conclusion reached."

The Government's position, in the case at bar, is to our minds ridiculous, in this, that it undertakes to protect, under its assumed and asserted guardianship, these so-called wards in respect to something that said alleged wards, competent, unrestricted and intelligent enterprising citizens of both the State and the Nation, freely and voluntarily divested themselves of more than a quarter of a century ago. We do not feel that it is lacking in propriety for us to observe at this point that the record does not show that these so-called Indian wards, whose alleged rights the Govern-

ment so zealously undertakes in this action to protect, are even advised of the present solicitous attitude of the Government in their behalf. If they had desired the aid and assistance of the Government they doubtless would have called upon it more than a quarter of a century ago and at a time prior to the exercise on their part of a right enjoyed by every American citizen to sign away and dispose of, upon a valuable consideration, that which belongs to him, unrestricted and uncontrolled.

(Proposition c.)

This Court is familiar with the general rule that a final judgment on the merits in an action between the same parties, or between those in privy with them, upon the same claim or demand, is conclusive whether right or wrong, not only as to every matter offered in the former action but as to every admissible matter which might have been offered to sustain the claim. See *Swift* v. *Jackson* (C. C. A. 10), 37 Fed. (2d) 237, 240, 241.

In *United States* v. *Lee*, 108 Fed. (2d) 936, the Tenth Circuit Court of Appeals, on December 21, 1939, said:

> "Next comes the question of the effect of the judgment of the District Court of Carter County rendered in the suit which Nellie Stechi instituted against Du Bois and Lee to cancel and set aside the contract. Since the homestead was free of all restrictions against alienation at the time of the execution of the contract, that court clearly had jurisdiction of the subject matter and of the parties. The authenticity of the contract, the due performance on the part of Lee, the amount due

him, his ownership of a part of the homestead, and his right to a lien on the remainder to secure the amount due him were issues tendered and adjudicated. That adjudication is binding and constitutes *res adjudicata* as to the parties to the action. But it is contended that such judgment is not binding on the United States since it was not a party. The United States is not bound by the judgment of a state court in respect of restricted property of an Indian ward where it was not a party. Zowling v. United States, 223 U. S. 528, 34 S. Ct. 659, 58 L. ed. 1080. But as has been said, the property in question was not restricted at the time the contract was executed and at the time the judgment of the state court was entered. *Nellie Stechi was unrestricted in her right to contract with respect to such property or to convey it. She exercised that right. A state court adjudicated her rights under the contract, and the decree has become final. A state court of competent jurisdiction in Oklahoma may render a valid judgment in respect to unrestricted property of an Indian of the Five Civilized Tribes. And such a judgment constitutes res adjudicata as to the Indian, and it is not open to attack in a later suit brought by the United States, except on jurisdictional grounds, even though the United States was not a party to the suit."*

In *Vinson* v. *Graham*, 44 Fed. (2d) 237, 240, 241, the Tenth Circuit Court of Appeals held in paragraphs 9-10-11-14 as follows:

"Decree of dismissal in suit brought by United States to cancel Indian's deed, held *res adjudicata* in subsequent suit brought by Indian himself seeking like relief but on different grounds.

"The former suit was brought by the government in behalf of a particular Indian and others, and the bill of complaint alleged that the lands described were allotted to the Indian as part of his surplus allotment as an adopted citizen of the Seminole Tribe, and that, under the treaty with the Seminoles and under the

laws of the United States, the Indian was not authorized to sell or alienate such lands. In the present case, the plaintiff alleged that he was a full-blooded restricted Indian, and that the deed was void because forbidden by restriction laws, and because mineral rights in the Seminole lands were severed from the surface rights under the Curtis Act, approved June 28, 1898, 30 Stat. 495, and because the mineral rights first vested in allottees on a date subsequent to time the deed was executed, so that only the surface estate, if any, passed by virtue of the deed. As respects doctrine of *res adjudicata*, separate grounds which would render the deed invalid did not constitute separate and distinct 'cause of action.'

"Valid judgment operates as estoppel as to every admissible matter which might with propriety have been offered to sustain or defeat claim.

"Judgment on merits concludes parties and their privies as to all grounds for asserting right known when suit was brought. * * *

"Decree against United States in suit prosecuted in behalf of restricted Indians bars subsequent suit by Indian on same cause of action."

In the body of the opinion that court said:

"A valid judgment on the merits, rendered by a court of competent jurisdiction in a former suit between the same parties or their privies, operates in a subsequent suit on the same cause of action, as an estoppel not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other admissible matter which might with propriety have been offered for that purpose. Cromwell v. County of Sac., 94 U. S. 351, 24 L. ed. 195; Baltimore S. S. Co. v. Phillips, 274 U. S. 316, 47 S. Ct. 600, 71 L. ed. 1069; Reynolds v. Schmidt (C. C. A. 10), 40 Fed. (2d) 238."

It will be noted from examination of the above case that the United States of America was representing the

owners of restricted Indian lands while in the case at bar neither the Indians nor the lands were restricted. In the case of *Heckman* v. *United States*, 224 U. S. 314, 56 L. ed. 820, the Court said:

> " 'In what cases the United States will undertake to represent Indian owners of restricted lands in suits of this sort is left, under the acts of Congress, to the discretion of the Executive Department. *The allottee may be permitted to bring his own action, or, if so brought, the United States may aid him in its conduct. * * * And, as already noted, the act of May 27, 1908, makes provision for proceedings by the representatives of the Secretary of the Interior in the name of the allottee. But in the opportunities thus afforded there is no room for the vexation of repeated litigation of the same controversy.* And when the United States itself undertakes to represent the allottees of lands under restriction, and brings suit to cancel prohibited transfers, such action necessarily precludes the prosecution by the allottees of any other suit for a similar purpose, relating to the same property."

The above rule is likewise applicable where the allottee conducts his own action without the aid of the United States.

In view of the above decisions, we submit that the decision of the Supreme Court of Oklahoma in *Broadwell* v. *Board of County Commissioners of Bryan County*, 88 Okla. 147, *supra*, which became final when the Supreme Court of the United States denied Broadwell's petition for writ of certiorari in 262 U. S. 740, *supra*, was *res adjudicata* as to Broadwell, his assignors in privy, Minnie Brewer and Lake Brewer, and the United States of Amer-

ica, even though the United States was not a party to the suit wherein the judgment was rendered.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of *certiorari* and thereafter reviewing the opinion of the Tenth Circuit Court of Appeals and reversing said decision.

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February, 1942.